(3)

03-718

No. 03-_____

Supreme Court, U.S.
FILED
DEC 12 2003
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES DESMOND TUCKER,

Petitioner

V.

FRANK EDWARD FEARN and
JUDY FEARN

On Petition For a Writ of Certiori
To The United States Court of Appeals
For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* ALABAMA TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Ross Diamond III
Attorney of Record for Amicus Curiae
Post Office Box 40600
Mobile, AL 36640-0600
(251) 432-3362

QUESTION PRESENTED

Whether the Eleventh Circuit erred in its application of the maritime wrongful death remedy to this pleasure boat accident, in lieu of the Alabama Wrongful Death Act, by holding that the parents in this case may not recover damages for the loss of the society and companionship of their minor son, merely because they were not dependent on him.

CONSENT OF PARTIES

Pursuant to Rule 37(2)(a) of the Supreme Court Rules, this Brief *Amicus Curie* is being filed with the written consent of all parties to the case, which are being filed herewith.

TABLE OF CONTENTS

QUESTION PRESENTED. i

CONSENT OF PARTIES. i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST 1

ARGUMENT 2

CONCLUSION 16

TABLE OF AUTHORITIES

CASES

American Dredging Co. v. Lambert,
81 F. 3d 127 (11th Cir. 1996) 9

American Export Lines v. Alvez,
446 U.S. 274, 282 (1980) 15

Anderson v. Whittaker Corp.,
894 F.2d 804 (6th Cir. 1990) 6

Garris v. Norfolk Drydock & Shipbuilding Corp.,
1998 U.S. Dist. Lexis 20374 1999
A.M.C. 769 (E.D. Va. 1998) 10-11

Garris v. Norfolk Drydock & Shipbuilding Corp.
210 F.3d 209 (4th Cir. 2000). 2, 11, 14

In Re Amtrak "Sunset Limited" Train Crash,
121 F. 3d 1421 (11th Cir. 1997) 1, 7

In re Denet Towing Service, Inc.,
1999 U.S. Dist. Lexis 8058 (E.D. La. 1999) 3, 15

In re Nobles,
842 F. Supp. 1430 (N.D. Fla. 1993 4

In re Patton-Tully Transportation Company,
797 F. 2d 206 (5th Cir. 1986) 5

Miles v. Apex Marine Corp.,
498 U.S. 19 (1990) 3-5, 6, 15

Miles v. Melrose,
882 F. 2d 976 (5th Cir. 1989) 5

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618 (1978) 3, 5, 15

Moragne v. States Marine Lines, Inc.,
398 U.S. 375 (1970) 1, 2, 5, 7, 10, 11, 12, 15

Norfolk Drydock & Shipbuilding Corp. v Garris,
532 U.S. 811 (2001) 2, 10, 12

Offshore Logistics v. Tallentire,
477 U.S. 207, 234 (1986) 15

Sea-Land Services, Inc., v. Gaudet,
414 U.S. 573 (1974) 2, 5, 10, 15

Sistrunk v. Circle Bar Drilling Company,
770 F. 2d 455 (5th Cir. 1985) 5

Sutton v. Earles,
26 F.3d 903 (9th Cir. 1994) 2, 13

The SEA GULL,
21 F. Cas. 909 (C.C. Md. 1865) 14

Yamaha Motor Corp., U.S.A., v. Calhoun, U.S.A.,
516 U.S. 199 (1996) 1, 6, 9, 15

STATUTES

Alabama Wrongful Death Act,
Alabama Code §6-5-410 7

Death on the High Seas Act,
46 U.S.C. §761 ..... 2, 12

Jones Act, 46 U.S.C. §688 ..... 2, 12

Va. Code §§65.2-302 11

Va. Code §§8.01-52 11

LAW REVIEW ARTICLES

The Curse of Miles v. Apex Marine Corp.:
The Mischief of Seeking "Uniformity"
and "Legislative Intent" in Maritime Tort Cases,
55 La. Law Rev. 745 (1995) 3

STATEMENT OF INTEREST

This Brief *Amicus Curiae* is submitted by the Alabama Trial Lawyers Association, a statewide bar association consisting of about 2000 lawyers who primarily represent plaintiffs in personal injury and death litigation and workers compensation claims.

The pending case is of great importance in that it determines the damages recoverable by the families of persons killed in a significant majority of pleasure boat accidents occurring on navigable waters within the State of Alabama. This case presents a question of law of particular interest to the citizens of Alabama, as a result of the decision of the Supreme Court in *Yamaha Motor Corp., U.S.A., v. Calhoun, U.S.A.*, 516 U.S. 199 (1996), permitting the application of state wrongful death damage remedies in cases not governed by the Jones Act or the Death on the High Seas Act, followed by the decision of the Eleventh Circuit in *In Re Amtrak "Sunset Limited" Train Crash*, 121 F. 3d 1421 (11th Cir. 1997), holding that the Alabama wrongful death statute could not be applied because it conflicted with established maritime law principles. That case specifically held that the families of the decedents were entitled to recover the damages allowed under *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), which include damages for the loss of the services and society of the deceased.

The decision in this case will affect the outcome of many other pleasure boat wrongful death cases now pending in state and federal courts in Alabama, and which will be brought in the future, since these case do not arise out of employment, a significant number of these cases will involve children, young adults without children, and mature adults whose children are grown and no longer dependent on them.

ARGUMENT

We respectfully urge the Court to grant certiorari to consider whether the Eleventh Circuit erred in holding that the general maritime law does not allow the parents of a minor child killed in a pleasure boat accident to recover damages for the loss of his society, and thereby resolve a conflict among the Circuits on this issue. On the question presented, the court below is in direct conflict with the Ninth Circuit decision in *Sutton v. Earles,* 26 F.3d 903 (9th Cir. 1994). We also believe that the Eleventh Circuit has placed itself in conflict with the decision of the Fourth Circuit in *Garris v. Norfolk Drydock & Shipbuilding Corp.,* 210 F.3d 209 (4th Cir. 2000), and the affirming decision of this Court in *Norfolk Drydock & Shipbuilding Corp.,* 532 U.S. 811 (2001), as discussed below.

We believe that the District Court and the Eleventh Circuit were in error in their interpretation of general maritime law because they relied upon decisions which were based upon the restrictions on damages recoverable for wrongful death under the Jones Act, 46 U.S.C. §688, and the Death on the High Seas Act, 46 U.S.C. §761, et seq., when those statutes have no application at all in this case.

The recovery of non-pecuniary damages is not inimical to the general maritime law. Loss of society damages have been awarded in all types of maritime death cases since the Supreme Court decision in *Sea-Land Services, Inc., v. Gaudet*, 414 U.S. 573 (1974), where the Court specifically held that loss of society damages were recoverable in the general maritime law cause of action for wrongful death recognized in *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970).

The only prohibition of non-pecuniary damages has come in cases governed by federal statutes which restrict the beneficiaries to

claims for economic loss resulting from the death of the decedent. In *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978), this Court held that since the Death on the High Seas Act restricted beneficiaries to pecuniary losses, loss of society damages could not be permitted in a case governed by that statute. In *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court held that since the wrongful death remedy based upon negligence under the Jones Act had been interpreted as allowing only the recovery of financial losses, the Court could not allow the recovery of loss of society damages under the companion cause of action for unseaworthiness under the general maritime law.

However, nearly all cases have since held that non-pecuniary damages, including loss of society, are recoverable in cases where the death occurs in state waters not governed by the Death on the High Seas act, and does not involve a claim against the seaman's employer governed by the Jones Act. See, generally, the article by professor Robert Force written before the more recent Supreme Court decisions discussed infra: Force , *The Curse of Miles v. Apex Marine Corp.: The Mischief of Seeking "Uniformity" and "Legislative Intent" in Maritime Tort Cases*, 55 La. Law Rev. 745 (1995). See also the extensive discussion of this question by *In re Denet Towing Service, Inc.*, 1999 U.S. Dist. Lexis 8058 (E.D. La. 1999), where the court stated:

> "This court joins other courts that have studied the issue and found no basis to extend Miles beyond the seaman-employer relationship. *Rebstock v. Sonat Offshore Drilling*, 764 F. Supp. 75 (E.D. La. 1991); *Verdin v. L&M Bo-Truc Rental, Inc.*, 1991 U.S. Dist. LEXIS 7057, 1992 AMC 93 (E.D. La. 1991); *Gerdes v. G&H Towing Co.*, 967 F. Supp. 943 (S.D. Tex. 1997); *Sugden v. Puget Sound Tug & Barge Co.*, 796 F.

> Supp. 455 (W.D. Wash. 1992); *Emery v. Rock Island Boatworks*, 847 F. Supp. 114 (C.D. Ill. 1994); *Mussa v. Cleveland Tankers*, 802 F. Supp. 84 (E.D. Mich. 1992) (related case to *Petition of Cleveland Tankers, Inc.*, 843 F. Supp. 1157 (E.D. Mich. 1994)). Because the Jones Act forecloses recovery for non-pecuniary loss in general maritime law cases only with respect to the relationship between a seaman and his employer, a seaman's status is relevant only in actions under the Jones Act or, after Miles, under the general maritime law against his employer. The Jones Act has no bearing on plaintiff's claim against Denet, a third party tortfeasor. As far as Denet is concerned, in the determination of which elements of damages decedent's estate is entitled to recover, it should make no difference whether the decedent was a seaman, a longshoreman or a passenger. Thus, there is no need for uniform treatment of an employer and a third party tortfeasor where there is no statutory remedy that is different than the general maritime law remedy." [Id. at 9-10]

By indicating that it was inclined to rule that loss of society damages were not recoverable under general maritime law, the Eleventh Circuit in the present case simply read *Miles v. Apex Marine* too broadly, failing to recognize that it applied only in claims against the decedent's employer which were governed by the Jones Act. As correctly stated by the Northern District of Florida in the case of *In re Nobles*, 842 F. Supp. 1430 (N.D. Fla. 1993):

> "Any reliance on *Miles v. Apex Marine Corp.* . . . as to the motion to strike the claim for loss of society is misplaced. The limitations on loss of society damages

> expounded in *Miles* spring from statutes inapplicable in this instance: 'There is no recovery for loss of society in a Jones Act wrongful death action.' 111 S.Ct. at 325 . . . This case is not brought under the Jones Act." [id at 1434, n.9]

In reaching a conclusion which denied recovery of loss of society damages merely on the basis that the decedent 's parents were not dependent upon him, the Eleventh Circuit further erred in relying upon a line of cases which no longer has any sphere of application.

After the decision *Mobil Oil Corp. v. Higginbotham*, and before the decision in *Miles v. Apex Marine Corp.*,many courts had held that where a seaman's death occurred in state waters and was caused by unseaworthiness, his family could recover loss of society damages through the general maritime law cause of action for wrongful death established in *Moragne* and *Gaudet*. Since the statutory wrongful death remedy under the Jones Act specified the beneficiaries and the order of taking, those cases held with some degree of logic that damages for loss of society should only be awarded to the **statutory** beneficiaries entitled to recover pecuniary damages for the loss of support and services of the deceased. *Sistrunk v. Circle Bar Drilling Company*, 770 F. 2d 455 (5th Cir. 1985); *In re Patton-Tully Transportation Company*, 797 F. 2d 206 (5th Cir. 1986). Those cases concluded that "denial of recovery [by a persons other than the statutory beneficiaries] lends more uniformity to the admiralty jurisdiction then allowing recovery." [*Sistrunk* at 459]. Unfortunately, that perceived need for uniformity lead to the decision in *Miles v. Melrose*, 882 F. 2d 976 (5th Cir. 1989), where the Fifth Circuit held that the non- dependent mother of a minor seamen could not recover damages for loss of society even in the absence of dependent statutory beneficiaries.

Before *Miles* reached the Supreme Court, the Fifth Circuit decision was followed by a few cases, including *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990), where the same principle was applied in a pleasure boat accident out of a mis-perceived notion that maritime law required uniformity of wrongful death damages regardless of the status of the parties or the location of the accident. Of course, the decision of this Court in *Miles v. Apex Marine Corp.*, foreclosed recovery of non-pecuniary losses in any Jones Act case. This left loss of society damages recoverable only in cases not subject to a federal statutory death remedy. **Clearly, *Miles* left the cases underpinning the *Anderson v. Whittaker* decision with no field of operation since there is no longer a need for the non-pecuniary damage award in a pleasure boat case to be limited to the statutory beneficiaries of the damages allowed in a Jones Act case.**

The cases relied upon by the Eleventh Circuit have been proven wrong in their prediction that "We believe [the language in *Guadet*] indicates that the Supreme Court would deny recovery for loss of society damages by a non-dependent parent." [*Anderson* at 812] In *Yamaha Motor Corporation, U.S.A., v. Calhoun,* 516 U.S. 199 (1996), this Court took an extensive look at damages which may be recoverable in a pleasure boat death case.

In *Calhoun*, the decedent was the 12 year old daughter of the plaintiffs, who sought the recovery of loss of society damages. This Court concluded that the allowance of the recovery of non-pecuniary damages by non-dependent parents under applicable state wrongful death statutes was not contrary to any established principle of maritime law. Yamaha had argued that this result would allow different measures of damages to be recovered in different states, disrupting the uniformity of the admiralty law. However, this Court made it clear that

the uniformity required by maritime law was that which dealt with the conduct of the parties in the determination of liability and apportionment of fault, not the damage principles to be allied:

> "The uniformity concerns that prompted us to overrule the *Harrisburg*, however, were of a different order than those invoked by Yamaha. *Moragne* did not reexamine the soundness of *The Harrisburg* out of concern that state damage awards in maritime wrongful-death cases were excessive, or that variations in the remedies afforded by the States threatened to interfere with the harmonious operation of maritime law. Variations of this sort had long been deemed compatible with federal maritime interests. See *Western Fuel*, 257 U.S. at 242. The uniformity concern that drove our decision in *Moragne* related, instead, to the availability of unseaworthiness as a basis of liability." [516 U.S. at 211]

In *Calhoun,* this court emphasized that the *Moragne* remedy was a floor, not a ceiling, the Court stated that:

> "*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies. The decision recalls that 'it better becomes the humane and liberal character of proceedings in admiralty to give and to withhold the remedy, when not required to withhold it by established and inflexible rules.' " [id. at 214]

The District Court in the present case was unable to apply the Alabama Wrongful Death Act, Alabama Code §6-5-410, because of the decision of the Eleventh Circuit in *In re Amtrack "Sunset Limited"*

Train Crash, 121 F. 3d 1421 (11th Cir. 1997), holding that the damages allowed by that statute run contrary to established maritime law principles:

> "In sum, applying the Alabama Wrongful Death Act in this case so as to allow recovery for wrongful death based upon simple negligence only would deprive the litigants of substantial admiralty rights that must be applied . . . .
>
> Accordingly, as the federal maritime interests present in this action outweigh Alabama's interests in having its wrongful death statute apply in its entirety, we hold that the district court erred in applying the Alabama wrongful death statute to the wrongful death claims in this action insofar as such Alabama statute provides for the recovery of punitive damages for simple negligence only and prohibits apportionment of fault and damages among joint tortfeasors."
> [id at 1427]

In foreclosing the application of the Alabama Wrongful Death Act, however, the Eleventh Circuit clearly did not intend to leave the families of persons killed in pleasure boat accidents without any remedy. On this point, the Court specifically held:

> "In the case of *American Dredging Co. v. Lambert*, . . . this Court held that *Yamaha, supra*, extended the right of recovery in wrongful death cases to the non-pecuniary remedies afforded by the Florida Wrongful Death Act to actions for wrongful death to non-seamen occurring in state territorial waters. **The plaintiffs in the wrongful death actions have available to them**

> **the remedies provided in *Moragne v. States Marine Lines* . . . .**" [id at 1427; emphasis added]

The context in which that ruling was entered implied, without so stating, that the maritime common law wrongful death remedy allows for the award of damages for loss of society to the immediate family of the deceased, without regard to dependency. The majority of the persons killed in the Amtrak crash were older adults with grown children or retirees with no dependents. To interpret that case otherwise would have left all of those victims of that terrible tragedy with no claim beyond funeral expenses.

The decisions of the Eleventh Circuit in *American Dredging Co. v. Lambert*, 81 F. 3d 127 (11th Cir. 1996) and on appeal after remand, 153 F. 3d 1292 (11th Cir. 1998) correctly held that the award of loss of society damages to non-dependent immediate family was consistent with the damages recoverable under the maritime common law death action. In the initial decision, based upon the then-recent opinion of this Court in *Yamaha Motor Corp., U.S.A., v. Calhoun*, the Eleventh Circuit affirmed the district court ruling that the defendant was potentially liable for non-pecuniary damages:

> "The law of governing the availability of non-pecuniary damages in admiralty actions has a long and convoluted history. However, in *Yamaha Motor Corp., U.S.A. v. Calhoun*, . . . the Supreme Court has recently resolved the question presented in this appeal. . . . There, the Court held that, when the claimants are not seamen or longshore workers, federal maritime law does not displace state wrongful death and survival statutes permitting non-pecuniary damages and wrongful death actions arising out of accidents in

> territorial waters and that state remedies remain applicable in such cases. **Because, under *Calhoun*, no federal statute or common law precedent precludes the personal representatives from recovering non-pecuniary damages** under Florida law, we affirm the denial of partial summary judgment on the issue of the recoverability of non-pecuniary damages." [81 F. 3d at 130; emphasis added]

In a trial after the remand, the district court awarded substantial non-pecuniary damages to the parents of each of the decedents. American Dredging appealed again, arguing that the district court erred by awarding damages for emotional pain and suffering to the surviving parents, even though they were not dependent on their deceased children. The Eleventh Circuit rejected that argument, holding that the award of non-pecuniary damages to non-dependent parents of adult children does not conflict with establishe maritime common law principles. [143 F. 3d at 1297]

In concluding that *Moragne* and *Sea-Land Services, Inc. v. Gaudet* , 414 U. S. 573(1974), no longer had any applicability, we believe the Eleventh Circuit misconstrued the recent decision of this Court in *Norfolk Drydock & Shipbuilding Corp. v Garris*, 532 U.S. 811 (2001), which compels a conclusion in the present case that the maritime common law death remedy permits the recovery damages for loss of society by immediate family of the deceased, without regard to dependency.

In that case, Celestine Garris sought recovery for the death of her son which occurred while he was employed as a harbor worker by a sandblasting subcontractor at Norfolk Shipbuilding. Her damage claim was stated by the District Court in *Garris v. Norfolk Drydock*

& Shipbuilding Corp., 1998 U.S. Dist. Lexis 20374, 1999 A.M.C. 769 (E.D. Va. 1998):

> "Plaintiff seeks damages under general maritime law for funeral expenses, pain and suffering of the decedent, loss of society, and loss of services." [1998 U.S. Dist. Lexis, at *3]

She did not make any claim for loss of support, and surely was not dependent on her son. Ms. Garris had dismissed her state court suit under the Virginia wrongful death statute, Va. Code §§8.01-52, et. seq., which would allow such damages to a non-dependent parent. The District Court held that the maritime death remedy recognized in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, did not include a cause of action for negligence, dismissing her maritime law claim with prejudice.

The Fourth Circuit, in *Garris v. Norfolk Drydock & Shipbuilding Corp.*, 210 F.3d 209, 220 (4th Cir. 2000), pointed out that Virginia law prohibited a tort action against a general contractor by the employee of a subcontractor under Va. Code §§65.2-302 by treating both as the "statutory employer" immune from suit under the workers' compensation laws. Therefore, the plaintiff could not assert the Virginia wrongful death statute and would have no cause of action unless the maritime law provided a negligence action for wrongful death. The Fourth Circuit agreed with the district court that the *Moragne* remedy did not include negligence. However, the Fourth Circuit held that there was no federal statutory impediment to creating a maritime negligence wrongful death remedy and no reason not to create such a remedy now. The Court held that the maritime common

law includes a wrongful death remedy based on negligence, providing a cause of action allowing Ms. Garris to seek damages for the death of her son.

This Court agreed with the Fourth Circuit as to both the limit of the *Moragne* remedy and the propriety of recognizing a general maritime law wrongful death negligence remedy:

> In sum, a negligent breach of a maritime duty of care being assumed by the posture of this case, no rational basis within the maritime law exists for denying respondent the recovery recognized by Moragne for the death of her son. [532 U.S. at 816-817]

The Court also made it clear that the "new" negligence wrongful death remedy was not impaired by or subject to the Jones Act, 46 U.S.C. §688, or the provisions of the Death on the High Seas Act, 46 U.S.C. §§761, et. seq.:

> "The Jones Act, 46 U.S.C. App. § 688(a), establishes a cause of action for negligence for injuries or death suffered in the course of employment, but only for seamen. . . . **Respondent's son, who was not a seaman, was not covered by the Jones Act, and we have held that the Jones Act bears no implication for actions brought by non-seamen**. . . . . **Moreover, even as to seamen, we have held that general maritime law may provide wrongful-death actions predicated on duties beyond those that the Jones Act imposes.** . . . The Jones Act does not preclude respondent's negligence action.
>
> DOHSA creates wrongful-death actions for negligence

> and unseaworthiness, see *Moragne,* supra, at 395, but only by the personal representatives of people killed "beyond a marine league from the shore of any State," 46 U.S.C. App. § 761. **Respondent's son was killed in state territorial waters, where DOHSA expressly provides that its provisions "shall . . . [not] apply,"** § 767. In Moragne, after discussing the anomalies that would result if DOHSA were interpreted to preclude federal maritime causes of action even where its terms do not apply, 398 U.S. at 395-396, we held that DOHSA "was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act," id. at 402. Or, "to put it another way, . . . no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law." Id. at 400. DOHSA therefore does not pre-empt respondent's negligence action."
>
> [Id. at 817-818; emphasis added; citations omitted.]

Although the opinion does not specifically discuss damages, surely it did not escape the attention of the Fourth Circuit and this Court that Ms. Garris sought only the recovery of non-pecuniary losses. These Courts would not have gone to all that trouble to allow Ms. Garris to recover only funeral expenses.

The Eleventh failed to recognize that the clear statements of this Court in *Garris* and *Calhoun* would permit recovery for loss of society damages by a non-dependent parent in a negligence claim for wrongful death under general maritime law.

As correctly argued by the Petitioner, the decision below is directly in conflict with the Ninth Circuit decision in *Sutton v. Earles,*

26 F.3d 903 (9th Cir. 1994) We further submit that the decision below conflicts withe the award of loss of society damages to a non-dependent parent, in the opinion written in 137 years ago by Justice Chase in *The SEA GULL*, 21 F. Cas. 909 (C.C. Md. 1865). In that case, a young man had been killed in a vessel collision. The father of the decedent brought suit for the loss of his son. Justice Chase awarded damages, holding:

> "In *Ford v. Monroe*, 20 Wend. 210, a father recovered damages for the death of his son, killed by the negligence of the defendant's servants; and in *James v. Christy,* 18 Mo. 162, an action was maintained against the owner of a boat, brought by a father to recover damages for the death of his son, occasioned by a defect in the machinery. These latter authorities were approved of by Judge Sprague, in the case of *Cutting v. Seabury*. He observes that 'the weight of authority in common-law courts seems to be against the action, but natural equity and the general principles of law are in favor of it.' He adds: '**It is not controverted that if a father be willfully and wrongfully deprived of the services, society, and control of his minor son, he may maintain an action against the wrong-doer if the son survive. Why, then, if the same wrong be done and aggravated by the death of the child, should his right of action be lost?**' It is difficult to answer this question, **and certainly it better becomes the humane and liberal character of proceedings in admiralty to give than to withhold the remedy, when not required to withhold it by established and inflexible rules.**"
> [Id. at 910; emphasis added.]

This case has been cited with approval and quoted in substance repeatedly by this Court, including the decisions in: *Yamaha Motor Corp., U.S.A., v. Calhoun*, 516 U.S. 199, 213 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990); *Offshore Logistics v. Tallentire*, 477 U.S. 207, 234 (1986); *American Export Lines v. Alvez*, 446 U.S. 274, 282 (1980); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 590 (1978); *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 583 (1974); and *Moragne v. States Marine Lines*, 398 U.S. 375, 387 (1970).

There is absolutely no reason for the Eleventh Circuit to have ruled otherwise in this case. We urge the Court to grant certiorari in order to give rather than to withhold the remedy since there are no established and inflexible rules restricting the recovery of loss of society damages in a state-waters death case of this type.

Finally, we urge the Court to grant certiorari review of this decision because a substantial percentage of pleasure boat cases will involve persons with no dependents. Since these case do not arise out of employment, a significant number of these cases will involve children, young adults without children, and mature adults whose children are grown and no longer dependent on them. Alabama is not unique in this regard, but unfortunately has perhaps the last wrongful death statute in the nation which allows the recovery of punitive damages for simple negligence.

The issue presented in this case also has application beyond the boundaries of our state, to cases involving facts such as those present in *Garris,* where the mother had no remedy under state law, and to cases involving the death of a seaman in state waters caused only by the fault of a third party not subject to the Jones Act, *In re Denet Towing Service, Inc.*, 1999 U.S. Dist. Lexis 8058 (E.D. La. 1999).

The result of the decision below is that the parents of the decedent would be limited to funeral expense of only $7,500.00 as damages for the death of their son. Surely the maritime law of the United States should not allow this result.

CONCLUSION

We respectfully urge this Court to grant certiorari to define the maritime common law negligence damage remedy for wrongful death in this case where no state or federal statute applies. This Court should also certiorari to confirm that the result of the decision in *Garris v. Norlfolk Shibuilding, supra,* allows immediate family members to recover damages for loss of society for the death of child or a parent, without regard to dependency.

Respectfully submitted,

Ross Diamond III
Attorney for Amicus Curiae
Alabama Trial Lawyers Association
Post Office Drawer 40600
Mobile, AL 36604
251-432-3362